LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
APR 1 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. [redacted] 44

UNITED STATES PLYWOOD CORPORATION,
Petitioner,

vs.

CITY OF ALGOMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

ROGER C. MINAHAN,
WALTER P. RYNKIEWICZ,
735 North Water Street,
Milwaukee, Wisconsin,
Counsel for Petitioner.

THE BYRON S. ADAMS PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Opinions below	1
Jurisdiction	2
Question presented	2
Constitutional Provision Involved	2
Statement of Case	2
Reasons for granting the Writ	4
Conclusion	7
Appendix A, Decision of Circuit Court, Kewaunee County	9
Appendix B, Opinions of Wisconsin Supreme Court	36
Appendix C, Judgments of State Courts	52

CITATIONS.

Cases.

American Mfg. Co. v. City of St. Louis, 238 Mo. 267, 142 S. W. 297	5
Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678	4, 7
Gardner-Richardson v. Evatt, 145 Ohio 362, 61 N. E. 2nd 704	5
Hooven & Allison Co. v. Evatt, 324 U. S. 652, 65 S. Ct. 870	4, 5, 6
Low v. Austin, 13 Wall 29, 20 L. Ed. 517	4
Washington Chocolate Co. v. King County, Wash., 152 P. 2nd 981	5
United States Constitution, Article I, Section 10, Clause 2	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. .....

UNITED STATES PLYWOOD CORPORATION,
Petitioner,

vs.

CITY OF ALGOMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

To: The Honorable Supreme Court of the United States.

Your petitioner, United States Plywood Corporation, respectfully shows:

I.

OPINIONS OF COURTS BELOW.

The opinion of the trial court, the Circuit of Kewaunee County (R., pp. 18-45), is not reported officially but is appended to this petition in Appendix A.

The majority and minority opinions of the Supreme Court of Wisconsin (R., pp. 66-83) are reported in 2 Wis. 2d 567, ... N. W. 2d ..... and are appended to this petition in Appendix B.

II.

JURISDICTION.

1. The judgment to be reviewed is that of the Supreme Court of Wisconsin dated and entered January 7, 1958, and appended to this petition in Appendix C.

2. The statutory provision believed to sustain the jurisdiction of the Supreme Court is 28 U. S. C. § 1257(c).

III.

QUESTION PRESENTED.

Is the levy of a general *ad valorem* tax by a state upon lumber and veneer imported by and stored in the taxpayer's storage yard and warehouse in the original form and packages in which they were imported prohibited by Article I, Section 10, Clause 2 of the United States Constitution?

IV.

CONSTITUTIONAL PROVISION INVOLVED.

The Constitutional provision involved is Article I, Section 10, Clause 2 which is as follows:

> "No state shall, without the consent of the Congress lay any imports or duties on imports or exports except what may be absolutely necessary for executing its inspection laws. * * *"

V.

STATEMENT OF THE CASE.

This is a proceeding to review a judgment of the Wisconsin Supreme Court affirming a judgment which denied petitioner's claim for refund of a general *ad valorem* property tax paid under protest, assessed upon imported goods

stored by the petitioner-importer in the original packages or form in which imported.

United States Plywood Corporation, the petitioner, conducts a manufacturing business in Algoma, Wisconsin, under the name of its Algoma Plywood and Veneer Company division. On May 1, 1955, the assessment date of the general *ad valorem* tax, it used both foreign and domestic veneers and lumber in its manufacturing operations (R., p. 43). Petitioner is not contesting the impositions of the tax on imported lumber and veneer which had entered the manufacturing process and had thus lost their status as an import. On May 1, 1955, petitioner also stored imported lumber and veneer in its warehouse and storage yard. It is the imposition of the tax on these imports which the petitioner has contested.

Foreign veneers were imported by the petitioner from Canada, France and the Belgian Congo. The foreign veneers were received in Algoma in the original packages in which they were shipped. They were kept in such packages, segregated and stored in petitioner's warehouse until used in the manufacture of plywood products (Finding No. 4, R., p. 43).

Foreign lumber was imported by petitioner from Ontario, Canada. The lumber was imported in rough, unplaned form. It was shipped uncrated on railroad cars. The lumber, when received, was piled in the petitioner's storage yard. Both foreign and domestic lumber must be kiln dried by the petitioner before manufacture. The imported lumber air dried while in storage to varying degrees depending upon how long it remained in storage. Air drying reduced the time required for kiln drying (Finding No. 5, R., pp. 43, 44).

There was no co-mingling of foreign and domestic veneers or foreign and domestic lumbers so as to cause a loss of identity (R., p. 27). On May 1, 1955, petitioner had on

hand imported lumber and veneer valued at $288,593.00. The Circuit Court of Kewaunee County found that one-half of the foreign lumber and veneer, a value of $144,296.26, was required to be on hand to meet petitioner's current operational needs as a manufacturer (Finding No. 9, R., p. 44).

Petitioner seeks review of that portion of the judgment of the Circuit Court for Kewaunee County, affirmed by the Wisconsin Supreme Court, which denied recovery of $2,677.46 paid by petitioner under protest with respect to imported lumber and veneer.

Petitioner contended that the imported lumber and veneer were immune from general *ad valorem* taxation under Article I, Section 10, Clause 2 of the United States Constitution at every stage of the proceedings, originally in the protest of the assessment before the Board of Review of the City of Algoma (R., p. 9), then in the Circuit Court action for refund (R., pp. 4, 5) and thereafter by appeal to the Wisconsin Supreme Court (R., p. 56). The constitutional issue was discussed in the major portion of the Circuit Court's opinion (R., pp. 18 through 30) and the entire opinion of the Wisconsin Supreme Court (R., pp. 66-83).

VI.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

(a) The Wisconsin Supreme Court has decided a federal question of substance in a manner in conflict with applicable decisions of this court.

From this Court's decision in *Brown* v. *Maryland*, 12 Wheat. 419, 6 L. Ed. 678 (1867), and *Low* v. *Austin*, 13 Wall. 29, 20 L. Ed. 517 (1872), to the most recent case of *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 65 S. Ct. 870 (1945), imports have been held immune from state general

taxation, losing the immunity only when subjected to a manufacturing process or when removed from the original package or changed from the form of importation. The Wisconsin Supreme Court has now overruled this court's decision in the *Hooven & Allison Co.* v. *Evatt* case by declaring imports taxable if required for a manufacturer's current operational needs, even though the imports are stored by the importer-manufacturer in a warehouse and storage yard in the original package or form of importation. The three justices dissenting in the case at bar noted that the majority decision was contrary to the *Hooven & Allison Co.* v. *Evatt* decision of this court. Petitioner submits that no state court may change the law interpreting the United States Constitution as declared by this court.

(b) The Wisconsin Supreme Court has decided a federal question of substance in a manner directly contrary to decisions of other state supreme courts on the same question.

The Ohio Supreme Court in *Gardner-Richardson* v. *Evatt*, 145 Ohio St. 363, 61 N. E. 2d 704 (1945), held that a manufacturer's imports, stored in the manufacturer's warehouse for future use, were not subject to general state taxation because of the constitutional immunity provision as interpreted by this court in *Hooven & Allison Co.* v. *Evatt*, *supra*.

Imports of the same character were constitutionally protected from general state taxation by the Washington Supreme Court in *Washington Chocolate Co.* v. *King County*, 21 Wash. 2d 630, 152 P. 2nd 981 (1944), cert. den. 324 U. S. 880. The Missouri Supreme Court also decided imports stored awaiting use are immune from tax. *American Mfg. Co.* v. *City of St. Louis*, 238 Mo. 267, 142 S. W. 297 (1911).

(c) The question presented is of national concern. If any doubts exist concerning the immunity of imports needed for a manufacturer's current operations, such doubts should be resolved by this court.

Many manufacturers and businesses store imports for future use. All but three states have general tangible personal property taxes. Very few states have attempted to tax imported goods while they remain the property of the importer and are stored in the original form or package in which they were received.

Decisions of state courts which recognize the immunity of imports stored awaiting use have been allowed to stand, as a practical matter, by this Court's denial of Certiorari in these cases. Immunity of imports from state taxation also resulted from the *Hooven & Allison* v. *Evatt* decision. Language in the *Hooven* case, however, seems to have created a question as to whether states may tax a manufacturer's "current operational needs", as an exception to the original package doctrine. The Wisconsin majority in the case at bar relies on a "current operational needs" exception. The Wisconsin minority takes the position that a "current operational needs" exception was considered and rejected by this court. Doubt exists in this tax area and should be resolved by this court.

By interposing a "current operational needs" exception to the long established "original package or form" doctrine, the Wisconsin Supreme Court has affected the operations of a large number of manufacturers and businesses in the United States. Manufacturers import goods with the intention of using these goods in the future. If such imports are subject to state taxation by reason of such intention or the likelihood of such future use, the constitutional provision granting immunity is emasculated and nullified. The theory of the exception made by the Wisconsin Court will subject to tax virtually all imports since few, if any, manufacturers will store or keep any imports not intended to be used in the near or immediate future.

Taxing authorities no doubt have relied on this court's *Hooven & Allison* v. *Evatt* decision, as well as the other

state court decisions noted above, in the administration of their property tax laws. A review by this court will clarify a now uncertain tax area. Clarification would save taxing agencies the expense of litigation if these agencies now seek to tax imports as a result of the Wisconsin Court's decision.

Duties on imports are an important source of Federal revenue. Duties paid to the federal government purchase an immunity from state taxation, *Brown* v. *Maryland, supra.* Permitting the states to tax the goods subjects them to double taxation, discriminates against imported goods and discourages that wider world trade essential to implement this nation's foreign relationships. Unless the doctrine of *Brown* v. *Maryland, supra,* which has been consistently followed for 160 years is preserved, the Constitutional pre-emption of the field of taxation of imports will be surrendered to the states. An important instrumentality of national policy available to the federal government thus will be eroded by state taxation.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Dated March 21, 1958.

Respectfully submitted,

ROGER C. MINAHAN,
WALTER P. RYNKIEWICZ,
735 North Water Street,
Milwaukee, Wisconsin,
Counsel for Petitioner.

APPENDIX A.

Decision of Circuit Court of Kewaunee County, Wisconsin.

(Formal Parts Omitted.)

Memorandum Decision.

Plaintiff owns and operates as one of its divisions a plywood and veneer plant in the city of Algoma. It paid its real and personal property taxes for the year 1955 under protest and brings this action against the city under sec. 74.73 to recover the portions of such taxes claimed to have been illegally exacted. The action involves questions of exemptions of imports and excessive valuations. There is also involved a question of duplication of taxes.

(a) Imported Veneers and Lumber.

In the manufacture of its veneered products the plaintiff uses both domestic and foreign lumber and veneers. The latter is directly imported by plaintiff as importer from Canada, France and the Belgian Congo. From Canada comes birch veneer, from France, French oak veneer, and from Africa, species of veneer known as korina and fuma. The veneers, both foreign and domestic, are shipped to plaintiff in bundles or wooden crates,—mostly the former. The bundles are secured by metal straps, and they, like the crates undoubtedly meet all the requirements of an "original package", as that term is used in the cases when taxability of imports by a state depends upon whether the goods are in the original package in which they were imported. The foreign lumber is imported by plaintiff directly from Ontario, Canada. The species are

birch and cedar. The lumber is used as core material. When received, it is piled in plaintiff's yard. It is claimed that each individual piece of lumber in a pile constituted an original package. The foreign veneers are kept stored in a warehouse until needed in manufacture, and, when needed, the packages are broken, and the individual pieces then commence their journey through the plant to become part of a veneered product.

Plaintiff reported as personal property subject to the state's ad valorem personal property tax all foreign veneers that had been taken from original packages on May 1st, 1955, and all foreign lumber that had been taken from piles in the yard to be run through the plant, but claimed, and still claims, that all imported veneers in its warehouse that remained in unbroken original packages and all imported lumber that remained in piles in its yard were immune from taxation under clause 2 of sec. 10 of Art. I of the Federal Constitution, which, so far as here material, provides:

> "No state shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports except what may be absolutely necessary for executing its inspection Laws * * * "

The asserted immunity is based upon *Brown* v. *Maryland*, 12 Wheat. 419, 6 L. ed. 678, and *Hooven & Allison Co.* v. *Evatt* (1945), 324 U. S. 652, 65 S. Ct. 870, 89 L. ed. 1252.

In the last mentioned case (hereinafter referred to as the *Hooven* case) the taxpayer was a manufacturer of cordage and other similar products in which it used foreign hemp, which it imported in bales. The question before the court was the taxability of the hemp while remaining in bales in the taxpayer's warehouse and awaiting use. Such hemp was regarded as being in original packages and non-taxable. The *Hooven* case would be dispositive, in plaintiff's favor, of the question of the taxability of any part of the

foreign veneers remaining in the warehouse in their original packages (and likewise dispositive of taxability of lumber if it be assumed both that each individual piece of lumber constituted an original package and that the lumber did not enter the manufacturing process until taken from piles and run through the plant) were it not for the following language of the court:

> "It cannot be said that the fibers were subjected to manufacture when they were placed in petitioner's warehouse in their original packages. And it is unnecessary to decide whether, for purposes of the constitutional immunity, the presence of some fibers in the factory was so essential to current manufacturing requirements that they could be said to have entered the process of manufacture, and hence were already put to the use for which they were imported, before they were removed from the original packages. Even though the inventory of raw material required to be kept on hand to meet the current operational needs of a manufacturing business could be thought to have then entered the manufacturing process, the decision of the Ohio Supreme Court did not rest on that ground, and the record affords no basis for saying that any part of petitioner's fibers, stored in its warehouse, were required to meet such immediate current needs. Hence, we have no occasion to consider that question." (89 L. ed. 1264.)

Acting, no doubt, under the authority of an opinion of the Attorney General rendered November 10th, 1949 (38 A. O. G. 563), which is to the effect that the *Hooven* case did not close the door to taxation of that part of a manufacturer's stock of imported raw materials essential to current manufacturing operations notwithstanding that such materials on hand May 1st remained in their original packages, the assessor taxed against the petitioner the value of one-half of the imported veneers then in the taxpayer's warehouse in original packages and imported lumber in piles, being of the opinion that one-half of such

stock on hand was needed to meet current operational requirements.

As I understand one of the arguments of the taxpayer, it is to the effect that other portions of the majority opinion in the *Hooven* case, by necessary implication, dispel the notion that the supreme court intended to leave open the question of whether raw materials on hand in original packages but needed by a manufacturer-taxpayer to meet his current manufacturing requirements is subject to an ad valorem personal property tax notwithstanding that the manufacturer is the importer. I consider, however, that the express reservation of the question contained in the language above quoted outweighs any implications to the contrary and requires the conclusion that the question with which we are now concerned remains open. I do not find in *Gardner-Richardson* v. *Evatt* (1946), 145 O. 363, 61 N. E. 2d 704, any consideration of the question whether such portion of a manufacturer's raw materials as was needed for current operational requirements was subject to tax nor any holding that such portion was not taxable. That point does not appear to have been considered.

In the *Hooven* case the court, before reserving the question above indicated, in part said:

> "It is evident, too, that if the tax immunity of imports, commanded by the Constitution, is to be reconciled with the right of the states to tax goods after their importation has become complete and they have become a part of the common mass of property within a state, 'there must be a point of time when the prohibition ceases, and the power of the state to tax commences.' *Brown* v. *Maryland, supra* (12 Wheat. (U. S.) 441, 6 L. ed. 686)." (89 L. ed. 1259.)
>
> • • • • •
>
> "The constitutional necessity that the immunity, if it is to be preserved at all, survive the landing of the merchandise in the United States and continue until a point is reached, capable of practical determination,

when it can fairly be said that it has become a part of the mass of taxable property within a state, is the same in both cases." (89 L. ed. 1264.)

There is nothing sacrosanct in the original package rule. Goods which come into this country on purchase by one engaged in the importing business and which are in turn sold in their original packages to a domestic manufacturer-user lose their constitutional immunity from state taxation as imports the moment the sale is made by the importer to the manufacturer. They then become taxable to the manufacturer as in the case of other property. *Waring* v. *Mobile*, 8 Wall. (U. S.) 110, 19 L. ed. 342.

The taxpayer sees in any departure from the original package rule,—that is to say, the rule that the immunity of contents of an original package from state taxation continues until the package is broken,—in the instant situation future problems involving tests which will be much more difficult of application than the original package test and which, it is claimed, will result in such lack of uniformity and confusion as to require adherence to a rule that all imports in original packages continue to enjoy immunity until the package is broken. I do not consider that any such difficulties provide sound and sufficient reasons for exempting a manufacturer from the state's personal property tax on that portion of his imported raw materials which he has himself imported and which remain in their original packages to the extent that such goods are needed to meet current operational needs. Lack of an infallibly accurate test does not argue against a power to tax. In this connection the dissenting opinion of Justice Black in the *Hooven* case should be considered.

If we accept the premise, as I think we should, that imported raw materials in original packages on hand May 1st, and required to be on hand at that time to meet the immediate or current needs of a manufacturer, have so

definitely been taken out of the stream of commerce and have so finally come to rest in his plant, there, to a practical certainty, to lose their identity in a manufactured product, so that it may reasonably be said that it is at least highly improbable that such goods will ever again become the subject of sale and transport in their original packages, then, I think, such raw materials must be regarded for all practical purposes as having irrevocably become a part of the common mass of property within the taxing district and, by virtue of that fact, subject to the state's ad valorem personal property tax.

By what criterion should a manufacturer's current or immediate need of a certain raw material be determined? In this connection the characteristics of Wisconsin's ad valorem personal property tax require further consideration. It is, first of all, a tax that is not a levy in lien form against property but a tax assessed against the owner of the property. It is assessed as of May 1st. The taxpayer is not liable for tax on property that he may own the day before May 1st but does not own on the latter date; nor may he avoid the tax on property which he owns on May 1st but disposes of on May 2nd. The May 1st circumstances are those that control.

I think that an importer-user of foreign raw materials may be subjected to the Wisconsin personal property tax on such part of such materials remaining in original packages as he has on hand May 1st and which he will be required to have on hand in the immediate future to meet his manufacturing needs for the period that would normally be required for him to secure additions to the inventory if he placed his order on May 1st, assuming the conduct of his business in the usual and normal manner. To illustrate: Assume a Wisconsin daily newspaper company that buys its newsprint from Canada. Its presses use 5 jumbo rolls of newsprint per day, each roll constituting

an original package. Assume also that an order for newsprint requires 20 days for delivery. Assume further that the company customarily keeps on hand about 300 jumbo rolls and that it has on hand May 1st exactly 300 rolls. It would thus appear that the presence of at least 100 rolls in the warehouse was indispensable to continuous publication of the newspaper unless purchases were made from a nearby domestic owner, in which case the newsprint so purchased would not enjoy the immunity, because of the doctrine that a sale by a domestic importer puts an end to the immunity as an import. *Waring* v. *Mobile, supra.* I do not believe that the intent of the *Brown* and *Hooven* cases would prevent Wisconsin from assessing its personal property tax against 100 rolls of newsprint on hand May 1st. The situation as it existed on that day was that the company could not, short of 20 days, import additional newsprint, and unless it had a 20-day supply on hand there could be no continuous publication of the newspaper with newsprint imported by the newspaper company from Canada. While of the 300 rolls on hand 200 could be regarded as surplus stock, certainly 100 rolls constituted the minimum requirement of current needs and should be regarded as being so irrevocably appropriated to use by the newspaper company as to have entered the process of publishing a local newspaper. I do not consider that the fact that orders placed before May 1st may have assured delivery of further newsprint before May 20th argues against the validity of the suggested criterion in the application of Wisconsin's *May 1st* personal property tax.

There are, of course, other criteria that may reasonably be used to determine in a practical manner what raw materials a manufacturer must have on hand to assure continuous operations. Counsel for the city has in this case suggested a "manufacturing cycle" test, and it may be that that test is better than the one indicated above. The

"manufacturing cycle" test amply supports the conclusion of the assessor that one-half of the foreign imports on hand May 1st were required to be on hand to meet plaintiff's immediate needs.

In its report of taxable personal property, submitted by the taxpayer pursuant to sec. 70.35 (1) on June 7th, 1955, the following statement appears (Exhibit 8, page 4):

"Non-assessable Raw Materials (Note A) $288,593."

* * * * *

"(Note A) Non-assessable Raw Materials consist of veneers and lumber, which are imported into the United States from Africa, Canada, and France upon which import duties have been paid to the Customs Department of the United States Treasury. These raw materials are stored in our raw material storage depot on May 1, 1955, in their original crates, cartons, bindings, etc., as such were received from Foreign countries at Ports of Entry."

Without attempting to draw any fine distinction between the lumber and veneers, the assessor determined that one-half the total, or $144,296.26, was taxable because needed to meet current operational requirements. The assessor reached his conclusion after study, inspection and observation of plaintiff's business and methods. Analysis of Exhibit 36, which shows how long the foreign veneers and lumber would have lasted had such raw materials on hand May 1st been used to fill orders rather than any subsequently received materials, sufficiently proves that the taxpayer had on hand not less than $144,296.26 in value of foreign veneers and lumber which were required to be on hand to meet current operational requirements. I do not think that the Federal Constitution requires that the assessor make separate determinations as to each separate class or specie of imports so long as the overall result remains within the value of total imports that have lost their character as such for purposes of an ad valorem state

tax assessed against the owner. If the criterion suggested by the Court is a proper one, it may be claimed that the evidence lacks proof as to how long it would take to obtain a shipment of some of the imports. The burden of proof in this respect becomes important, but even though it rested with the city, Mr. Kambach's testimony as to the time it takes to obtain a shipment of French or African veneer, together with reasonable probabilities as to the time it takes to secure shipments of other imports, leaves the assessor's determination that imports to the value of $144,296.26 as being assessable against plaintiff fair and reasonable to the company.

What has been said assumes the taxability of lumber to be limited to operational needs as in the case of veneers. That was the assessor's view. But I think in such respect he was in error in not regarding a larger portion than one-half of the foreign lumber as being taxable. The taxpayer did not set aside any particular part of its lumber storage yard or veneer warehouse for the storage of foreign materials. Veneers were piled separately according to specie, without regard to whether the adjacent pile was of foreign or domestic origin and without regard to the time of receipt. A portion of a new shipment of fuma veneer, for instance, would be placed on a partially depleted pile of that veneer and could be the first next taken for use. It is not considered, however, that there was such commingling of foreign and domestic veneers or foreign and domestic lumber as to cause a loss of identity.

Most of the foreign lumber when received was "green". Apparently most of the domestic lumber was purchased green also. All lumber when received was piled in a manner to facilitate air drying. While the method of piling adopted was intended also to prevent decay, it cannot be said that this was the dominant purpose. It appears that air drying never sufficiently removes the moisture content

of lumber to permit its use by plaintiff without running the lumber through the dry kilns. It also appears that green lumber is not generally run through the dry kilns without a period of air drying and that it is not "good business practice" so to do. It is the normal procedure or practice that should and does control, and I think, at least as to the lumber received green—which accounts for most of the Canadian lumber—that when it was received and piled, the dominant purpose was to prepare it for use by air drying, thus by a slower but more economical process accomplishing in part what kiln drying would accomplish.

There is no evidence as to the proportion of Canadian lumber that was on hand that was received green except that most of it was. If it be claimed that lumber already partially air dried but sufficiently dry to be run through the dry kilns as a matter of good business practice was not subjected on piling to the processes of manufacture, I think that, conceding the validity of such claim, it, nevertheless, becomes clear that green lumber on receipt and piling entered the "process of manufacture" and lost immunity as an import. In the *Hooven* case the court said:

> "This Court has pointed out on several occasions that imports for manufacture cease to be such and lose their constitutional immunity from state taxation when they are subjected to the manufacture for which they were imported." (89 L. ed. 1264.)

The assessor would have been warranted in taxing all of the green Canadian lumber. When received by the taxpayer it was not ready for use if good business practices were followed by the taxpayer. When the company received the lumber it immediately proceeded to make it ready for use by subjecting it to the air drying. Such air drying was part of its manufacturing practices.

A further question has been raised in connection with

imports, and that is whether each individual piece of lumber constituted an original package. This lumber comes in rough form, that is, unplaned. It is 2 inches thick, of standard lengths and of standard widths, such as 4 inches or 6 inches. Counsel for the taxpayer cites the case of *Dant & Russell, Inc.* v. *Board of Supervisors of Los Angeles County* (Cal. App. 1942), 128 P. 2d 389, as authoritatively deciding that each individual piece of lumber in a shipment received by the taxpayer from Canada was an original package. Language in the opinion in that case is to such effect. The supreme court of California, however, reversed the decision (133 P. 2d 817 (1943)). While the reversal was on other grounds, the same appellate court that rendered the decision, later declared that the effect of the supreme court's decision was to "black out" and leave without any "authoritative value or standing" the determination that each piece of lumber was an original package and came to the opposite conclusion. *E. J. Stanton & Sons* v. *Los Angeles County* (1947), 78 Cal. App. 2d 181, 177 P. 2d 804. In the last mentioned case it appears that Stanton was engaged in the wholesale and retail lumber business. He imported lumber which, as in the instant case, was shipped loose,—that is, not bundled or fastened together in any other way. He was taxed on the portion of the shipment that remained after sales had been made from such shipment. The tax was upheld. The supreme court of California refused a hearing, and the United States supreme court denied certiorari. 332 U. S. 766, 68 S. Ct. 75, 92 L. ed. 352. See *Simon* v. *City of Los Angeles* (Cal. App. April 24th, 1956), 296 P. 2d 381, where the court gives effect to the decision in the *Stanton* case as follows:

> "The power of the county to tax was thus upheld upon the theory that the 'aggregation of articles imported' constituted in legal concept an original package which was broken when some of the parts of the 'aggregation' were sold locally. The case undoubtedly repre-

> sents the law applicable to a situation where packaging is inherently impossible or impracticable. Our Supreme Court refused a hearing and the United States Supreme Court denied certiorari. 332 U. S. 766, 68 S. Ct. 75, 92 L. ed. 352. But the *Stanton* case does not control imports which actually are in packages. In such instances the question is what is the original form or package."

The evidence here was not directed to the ascertainment of whether the foreign lumber on hand May 1st consisted of broken or unbroken shipments. Such determination is unimportant to the sustainability of the assessment upon the grounds assigned by the assessor.

(b) *Excessive Valuation of Real and Personal Property.*

Plaintiff operates a large industrial plant in a small city. Its real estate consists of two plants, known as the Perry Street Plant and the Navarino Street Plant. In addition to the lands which are used industrially plaintiff owns three residences and three vacant residence lots. The latter six parcels of real estate were separately assessed in the manner usual in such cases (Exhibits 13 to 18). No complaint is made of these assessments. The complaint goes to the valuation of the industrial lands and buildings and certain items of personal property.

Plaintiff's right to question the taxation of imports does not necessarily rest on sec. 74.73, but its right to a refund based upon "allegedly excessive assessments", whether of real or personal property, does. Counsel for the city calls attention to sec. 74.73 (2), which in part provides that

> "No claim shall be allowed and no action shall be maintained under the provisions of this section unless it shall appear that the plaintiff has paid more than his equitable share of such taxes."

and to *Krom* v. *Antigo*, 220 Wis. 542, *Highlander* v. *Dodge*-

ville, 249 Wis. 502, and *Yawkey-Bissell Corp.* v. *Langlade*, 261 Wis. 524, which deal with plaintiff's burden in establishing that he "has paid more than his equitable share of such taxes", and urges the Court to dispose of the claims of excessive assessments for reasons set forth in his brief as follows:

> "It is defendant's position that *Highlander* v. *Dodgeville, supra*, rules the case at bar and that plaintiff has not offered evidence sufficient to cause the Court to act in weighing the evidence. Even if the assessment has been in an amount three times the fair market value of plaintiff's property, plaintiff could not have recovered unless it proved that the rest, or a substantial part of the rest, of the property in Algoma had been assessed on a different basis, such as only twice its fair market value. The burden of proof is on the plaintiff, and the presumption exists in favor of the correctness of the assessment. Under the *Krom* and *Highlander* cases, *supra*, plaintiff has offered insufficient evidence, and there is nothing to be considered by the court except the constitutional question.
>
> "In *Yawkey-Bissell Corp.* v. *Langlade*, 261 Wis. 524, 53 N. W. 2d 174 (1952), the taxpayer recovered for the reason that since 'the cutover lands in question were illegally assessed in 1948 at more than their full value, and no other property in the township was assessed at more than one-half of such value, such assessment of such lands was clearly illegal.' (page 527) This holding is a confirmation of the rule in *Highlander* v. *Dodgeville, supra*, and a practical application of that rule in setting up the requirements which a taxpayer must fulfill in order to recover. Plaintiff in the case at bar has not met those requirements.
>
> "Assuming, as claimed by plaintiff, that the lands, the buildings, the logs and the repairs and maintenance parts of plaintiff were overassessed, and that there was a duplication of assessment in respect to machinery and furniture and fixtures, plaintiff has nevertheless, made insufficient showing to entitle it to recover. Since plaintiff failed to offer any testimony as to the

value of the other real estate owned by it in Algoma and described in plaintiff's exhibits 13, 14, 15, 16, 17 and 18, plaintiff has failed to show that its property, taken as a whole, was assessed at more than its full market value, and that its property, taken as a whole, was assessed on a disproportionately higher basis than the rest of the taxable property in Algoma. The burden of proof is on the plaintiff, and plaintiff did not even offer evidence to prove that its property, taken as a whole, was assessed on a disproportionately higher basis than the rest of the taxable property."

The city's position is that by simply proving an assessment for more than market value a taxpayer does not make out a case for a refund. Plaintiff must go further, it is argued, and establish by evidence other than the testimony of the assessor that at least a substantial portion of other property in the taxing district is not assessed for more than market value. Merit in the argument is to be found in the probability that there has not yet been born an assessor who would admit on the witness stand that his purpose was to assess all property at 100% or 60% of true market value, as the case may be, but as to plaintiff be assessed at a higher percentage. Hence, a rule that would permit a taxpayer to recover a refund based upon an excess over a percentage assessment, which the assessor will always claim he applied to all similar property, upon mere proof that in plaintiff's case the assessor did not follow his rule, would, as a practical matter, permit plaintiff to make out a case under the statute without proving that the same injustice or error which infects his assessment does not also infect the assessment of at least a substantial portion of the taxpayers in his district.

The city's contention that the plaintiff failed to prove that its residence lots and property were not assessed at less than full market value requires dismissal of the plaintiff's claims to an over-assessment of other of its property

involves a question which would deserve serious consideration in the case of a taxpayer who owns two pieces of property—say, a merchant who owns a downtown store and also his residence—and in protesting the assessment of the store proves only its over-valuation without at the same time proving that there has been no under-valuation of his home or the stock of merchandise in his store, on the theory that he stands before the court asking an equitable accounting of his taxes due his city and that he should not be permitted to recover any amount unless his aggregate tax bill is too high. While the equitable considerations in such a situation are apparent, they need receive no more attention here, because it is obvious that no conceivably reasonable claim of under-valuation of plaintiff's residence property could offset an over-valuation of plaintiff's industrial property by an amount that would leave a net over-assessment so small, under plaintiff's theory of values, as not to deserve consideration under the rule of the *Krom* and *Highlander* cases.

Acts passed by the 1953 and 1955 legislatures here require consideration. The 1953 legislature added subsec. (4) to sec. 74.73, thereby denying to a taxpayer the right to maintain a plenary action, such as the instant one, to recover as a refund the portion of his taxes which he established constituted an unjust share under the decisions of our supreme court and thus relegated him to certiorari proceedings under sec. 70.47 (9) (a) or to invoking the remedy before the department of taxation provided for by sec. 70.85.

The legislature, by Chapter 111 of the Laws of 1955, which became effective May 11th, 1955, changed sec. 70.49 (2) to read as follows:

> "The value of all real and personal property entered into the assessment roll to which such affidavit is attached by the assessor shall, in all actions and pro-

ceedings involving such values, *be presumptive evidence that all such properties have been justly and equitably assessed in proper relationship to each other.*"

Previously the statute made the values appearing on the roll "*presumptive evidence of the full market value*" of the property only.

The same legislature, by Chapter 440 of the Laws of 1955, effective July 26th, 1955, repealed and recreated subsec. (4) of sec. 74.73 so as to again permit suit to be brought to obtain a refund of taxes on account of an excessive assessment. It is clear that the act which restored the cause of action did not dispense with or change any of the requisites of a cause of action under the statute, as established by prior decisions, and is, therefore, not here important.

Counsel for plaintiff does not contend that the change in sec. 70.49 (2) does not broaden and give more scope to the presumption accorded an assessment but does contend that it is inapplicable here because the new statute was not passed until May 11th, 1955. With this contention I disagree. The amendment merely changed a rule of evidence and did not affect any vested right. The change in the rule *did not operate to* give to an assessment a conclusive effect as distinguished from a presumptive effect. The present statute has application to this action, which was commenced long after the statute took effect. *Estate of Sletto,* 224 Wis. 178, 181; *Will of McNaughton,* 138 Wis. 179, 189; *Flanders* v. *Town of Merrimack,* 48 Wis. 567, 570. The assessment in the instant case actually was made after May 11th, 1955, while under sec. 70.10 assessments are required to be made as of the close of May 1st, they need not be completed before the first Monday in July. Taxpayer's personal property statement (Exhibit 8), filed in accordance with sec. 70.35, was not required to be filed

before May 25th and was not filed until long after May 11th. *Northern Supply Co.* v. *City of Milwaukee*, 255 Wis. 509, is, clearly, not controlling.

Freight on Logs. Complaint is made because the assessor, in arriving at the true cash value of certain logs on hand as part of the company's raw materials, took the figure at which the cost of the logs appeared on the company's books, which was $71,925. This cost, naturally, included the freight paid by the company. It appears that these logs are usually bought from places in northern Wisconsin and Minnesota, and that the logs were purchased F. O. B. the landing point or point of origin. Based upon testimony of Mr. Kambach that on a single occasion, and for reasons that do not appear, some logs were sold to a veneer plant in Menasha, the company assuming the freight, it is claimed that if plaintiff should not use its logs but should sell them instead, it would have to bear the freight, and, therefore, in computing the true cash value, freight which the plaintiff paid should be excluded. Naturally, if plaintiff purchased logs from a certain point in northern Minnesota, paying the freight, and later sold some of such logs to a plant in Menasha, the Menasha buyer would not pay more than it would cost him to get the logs from northern Minnesota, and no doubt the freight to Menasha would not be more than to Algoma. This testimony falls far short of proving that the assessor erred in assessing the logs for $71,925, which was the cost of the logs to the company as shown on the company's books. I perceive no merit in plaintiff's contention. I think it can be safely said that, normally, any manufacturer deciding to sell off part of his raw materials rather than using them would have difficulty in realizing cost. As to other items of raw materials into which freight enters as a part of cost, no complaint is made that injustice is done by taking cost per the company's books as being the true cash value.

Repair and Maintenance Parts. The assessor added to plaintiff's personal property the company's repair and maintenance parts, which were carried on the books in the amount of $71,360 as prepaid expense, such figure representing cost, but which had not been returned as assessable property. He valued this property at cost. While it is argued that this property should not be valued at cost, plaintiff offered no proof of value whatever, and there is nothing in the record in the way of proof that establishes that cost to plaintiff was not true cash value. Mere claim that an assessed value is too high falls far short of establishing a cause of action for a refund. See the *Krom* and *Highlander* cases, *supra.*

Industrial Lands and Buildings. Plaintiff claims that the assessed valuation of industrial buildings should be reduced from $1,297,066 to $586,000, under the proofs made, and the lands reduced from $101,840 to $16,485, and a refund of taxes ordered accordingly. The over-all assessment problem which plaintiff's properties create is self-evident. Plaintiff was dissatisfied with the 1954 assessment and filed a petition with the tax commission for a reassessment. Instead of ordering reassessment, the tax commission directed a supervised assessment to be made, pursuant to the statutes, in the year 1955, and to this method of procedure plaintiff did not object. The commission appointed J. D. Semrad to supervise the assessment. Plaintiff protested its assessments before the board of review, and the board confirmed the assessments made.

At the trial plaintiff produced Kenneth Sarles as its chief expert witness. Richard Bourguignon, who assisted in preparing an appraisal, also testified in plaintiff's behalf as an expert. Both Mr. Semrad and Mr. Sarles qualified as experts, with an imposing experience background, and they differed radically as to the formula or method most reliable in determining market value of plaintiff's

plant. Comparable sales as a criterion of value of the plant were non-existent. The market value of the plant—land, buildings and fixtures—lies in theory. Market value of the buildings and fixtures independently of the land also lies in theory. The market value of bare industrial lands finds some test in the market value of neighboring lands. Conflict between these experts was to be expected. Mr. Semrad, however, does not stand before the Court as a paid expert employed by a private litigant. He was employed by the state tax commission to supervise a reassessment.

As to the value of the plants, including industrial lands, the testimony of Mr. Semrad sufficiently supports these values, and they must be sustained. *Wisconsin Malting Co. v. Manitowoc*, 225 Wis. 393. It should be noted that the basis upon which the plaintiff acquired these properties was not made to appear in evidence. Did it or did it not make its purchase on the basis of certain values being assigned to the tangible assets of the old company? While the plaintiff did not buy the assets of the old company but bought the outstanding capital stock instead, it seems reasonable to suppose that in the negotiations the market value of the physical plant received some consideration.

Duplication. The company reported (Exhibit 8) its machinery and tools constituting personal property at $98,445, and furniture, fixtures and equipment constituting personal property at $25,053. These were the depreciated values per the company's books. These values were accepted and reduced to round figures at $98,440 and $25,050, or a total of $123,490, and assessment was made accordingly. Mr. Semrad was not satisfied, however, to accept the depreciated cost figures of machinery and equipment forming part of the real estate, which was all that the company had supplied him. He called for a statement of cost as to such items, and received Exhibit 10, which lists

costs at $1,694,095.92, depreciation at $879,393, and net book value at $814,702.92. Because of the great increase in costs in recent years Semrad added 15% to costs and then reduced that figure by 30% to arrive at present cash value. No complaint is now made as to such method of valuation, nor was any proof offered tending to show that the resulting figures were too high. It developed at the trial that in furnishing Exhibit 10 the company did not exclude machinery and equipment falling within the classification of personal property, and as a result Semrad was misled and inadvertently included in the assessment of $1,363,740 for fixed machinery and equipment in the Perry Street plant (Exhibit 20) and in the Navarino plant (Exhibit 19) the above mentioned personal property already assessed at the sum of $123,490.

I think that this showing calls for a holding that plaintiff is entitled to a refund in an amount it has satisfactorily proved its taxes were increased by the error. And I think, too, that no time should be spent on the proposition that had the error not been made, it may be questionable whether the total tax bill would have been less, because I believe that had the company listed in Exhibit 10 only its machinery and equipment constituting fixtures, Mr. Semrad would have employed the same percentages that he actually used in arriving at value. The duplication was the result of an inadvertent act. It was a mistake. And I think that it is such a mistake as, under the rationale of the decision in *State ex rel Pabst B. Co.* v. *Kotecki*, 163 Wis. 101, must be remedied, even though plaintiff did not produce proof of the value of the fixed machinery and equipment forming part of the real estate after excluding the duplicated items.

Counsel for plaintiff in his computations assumes that because the company reported the depreciated value May 1st, 1955, of machinery and equipment constituting per-

sonal property as being a certain percentage of the May 1st, 1955, depreciated value of all machinery and equipment, whether personal property or forming part of the real estate (Exhibit 8), the same percentage must be used in reconstructing the cost of machinery and equipment appearing on Exhibit 10 and which the assessor used as a starting point. That, of course, cannot be done because of the different rates of depreciation that were applied to different classes of machinery and equipment. I think that the refund should be based on what here appears as a certainty. Taken as personal property, the tax assessed amounted to $123,490 × .0185553, or $2,291.39. Taken as fixtures, the exact tax assessed is not determinable. If, as fixtures, the same property was taxed at a higher sum, plaintiff has not proved the amount. If taxed at a lesser sum, the city should not be heard to say that although it collected taxes on this property as real estate it should not refund the tax it has also collected on the property as personalty because there is a failure of definite proof as to the amount of taxes resulting from the assessment as real estate. The taxpayer is entitled to a refund in the amount of $2,291.39, with interest.

In General. Except as respects the constitutionality of the tax on imports and the unintended duplication of certain items of personal property, plaintiff's complaint in general simmers down to this: that the city of Algoma has assessed its real estate at values that exceed fair market value and certain of its personal property at values that exceed true cash value. It asks the Court to remedy such situation by adopting its own experts' ideas of value as to the lands and bare buildings. In fixing the true cash value of logs it asks the Court to adopt a rule based upon an isolated experience that would appear to be contrary to common practice of manufacturers in valuing their raw material. As to repair and maintenance parts it produced

no evidence of value but yet maintains that the Court should cut the assessor's figures one-half. I think it may be fairly said that what plaintiff in effect seeks to do is to make an assessor out of the Court. In *Buildings Development Co.* v. *Milwaukee,* 225 Wis. 357, 364, the court said:

> "But property owners must, in all but plain cases of breach of statutory duty, rely on just and fair treatment by assessing authorities, rather than the courts, for avoidance of intolerable assessments. We perceive nothing in the record before us to warrant the court in interfering with the instant assessments."

Plaintiff contends that the proof establishes a cause of action under sec. 74.73 justifying if not requiring, reduction of building valuations from $1,297,066 to $586,000 and land values from $101,840 to $16,485. It is earnestly argued that reductions should be to the latter figures. Such a reduction would mean that the land assessment has been slightly more than six times market value and would convict Mr. Semrad of either an inexcusably neglectful performance of his duties or gross incompetency, although his history of employment by the tax commission to supervise assessments and the study made of values in this case and justification of values would indicate the exact contrary. Does the disparity between land value figures cast more doubt on the reliability of the testimony of plaintiff's experts than on Mr. Semrad? The presumption which the statute gives to the correctness of an assessor's figures would appear to be entitled to its strongest application when an assessment is supervised by an expert appointed by the tax commission.

We certainly do not here have such a case of injustice as was established by the proofs of *Yawkey-Bissel Co.* v. *Antigo, supra.* Mr. Bosman's testimony, essentially hearsay in character, and the evidence as to the assessment of the Algoma Lumber Company lands, and the comparison

made of their value to that of plaintiff's lands, fall far short of establishing a case for a refund within the rule of the *Highlander* case. The evidence does not warrant me in holding that the assessments are so substantially out of line with other assessments as to impose an inequitable tax burden. To grant a refund the case must be one in which the proofs warrant the court in holding, with a reasonable certainty of being right, that the taxpayer has paid a certain number of dollars too much in relation to other taxpayers. This is not such a case.

Plaintiff proposes a finding to the effect that Mr. Semrad as supervisor made the assessments without the concurrence of Mr. Graf, the city's assessor, and it is claimed that the assessment is illegal for that reason. The assessor and the supervisor acted together. Both signed the statutory affidavit attached to the assessment roll. Which of the two wrote the figures upon the assessment roll is not important.

Plaintiff is entitled to a refund on account of the duplication above dealt with, and that is all. As to costs, plaintiff is entitled, I consider, to a $100 attorney fee and clerk's fees, and that other disbursements should be limited to two days attendance on the part of Mr. Kambach as a witness. I consider that only his testimony was essential to the proof of the duplication.

Dated this 24th day of October, 1956.

By the Court,
E. M. DUQUAINE,
Circuit Judge.

Findings of Fact and Conclusions of Law.

(Formal parts omitted.)

The issues joined in this action having come on for trial before the above named court and having been tried, the plaintiff appearing by Messrs. Whyte, Hirschboeck & Minahan, and defendant appearing by Messrs. Larkin & Blum and by S. Knudson, City Attorney, and after hearing the proofs of the parties and the arguments of counsel, and being advised in the premises,

NOW, THEREFORE, I, The Hon. E. M. Duquaine, the judge before whom the same was tried, Do Decide And Find As

FINDINGS OF FACT.

1. Plaintiff is a foreign corporation, licensed to do business in the State of Wisconsin, and was the owner of land, improvements and personal property within the City of Algoma, Kewaunee County, Wisconsin, on May 1st, 1955.

2. The City of Algoma comprises a taxing district within the State of Wisconsin for the assessment of property taxes upon land, improvements and personal property.

3. The City of Algoma assessed the real and personal property of plaintiff for taxation as of May 1st, 1955. Such assessment was a supervised assessment under Wisconsin Statutes, the supervisor being Mr. J. D. Semrad. The city's assessor and said supervisor acted together in making the assessments, and both signed the statutory affidavit attached to the assessment roll. Plaintiff filed written objections to its assessments, and hearing on the same was held before the Board of Review of the City of Algoma. The Board of Review affirmed the assessments. Plaintiff paid its real and personal property taxes for the year 1955, under protest, on January 4th, 1956. The city council took no action upon plaintiff's claim for refund, and plaintiff commenced this action on April 2nd, 1956.

4. In the manufacture of its products plaintiff uses both foreign and domestic wood veneers. Foreign veneers are directly imported by plaintiff as importer from Canada, France and the Belgian Congo. Such foreign veneers are received by plaintiff at its plant in Algoma in the original packages in which they are shipped. They are kept in such packages and stored in plaintiff's warehouse until used in the manufacture of a veneered product.

5. Plaintiff also uses both foreign and domestic lumber in its manufacturing operations. Foreign lumber is directly imported by plaintiff as importer from Ontario, Canada, the species being birch and cedar. The lumber is imported in rough form, that is, unplaned. It is 2 inches thick, of standard lengths and standard widths, such as 4 inches and 6 inches. It is shipped loose in railroad cars, the sticks or individual pieces of lumber not being bundled or fastened together in any other way. Most of the foreign lumber is purchased and received "green". The lumber when received is piled in plaintiff's storage yard in such manner as to facilitate air-drying and with the dominant purpose of subjecting the lumber to air-drying before converting it into a manufactured product. Air-drying does not sufficiently remove moisture from lumber to enable plaintiff to use it in its products. Some kiln-drying is necessary to bring the lumber to the degree of dryness requisite for use by plaintiff. While green lumber may be wholly kiln-dried, it is plaintiff's practice, and also good business practice, to subject green lumber to air-drying before running the lumber through the dry kilns. That is more economical than wholly kiln-drying green lumber. Most of the foreign lumber on hand in piles in the storage yard on May 1st, 1955, was lumber which had been received in green condition, and all such green lumber was then being subjected to the manufacture for which it was imported.

6. The foreign veneers on hand in warehouse in original

packages and foreign lumber in piles in storage yard on hand May 1st, 1955, were of the value of $288,593. The assessor determined that one-half of the imported veneers and lumber were necessarily on hand to meet plaintiff's current operational needs as a manufacturer and assessed against plaintiff for personal property taxes the value of one-half of such foreign veneers and lumber, or $144,296.26. The assessor's determination was fair to the plaintiff, and it is the Court's finding that at least one-half of said foreign veneers and lumber and of the value of $144,296.26 were required to be on hand because reasonably necessary to meet plaintiff's current operational needs as a manufacturer.

7. Veneer logs, which were assessed at a valuation of $75,925, were not assessed in excess of true cash value. Repair and maintenance parts, which were assessed at a valuation of $71,360, were not assessed in excess of true cash value.

8. Plaintiff's industrial real property was not assessed at more than full value which could ordinarily be obtained therefor at private sale.

9. In the valuation of $1,363,740 placed upon fixed machinery and equipment forming part of the industrial real estate there was inadvertently included by the assessor items of machinery, tools, furniture, fixtures and equipment constituting personal property separately assessed as personal property at a valuation of $123,490, and on account of which taxes in the amount of $2,291.39 were levied. No proof was adduced by plaintiff that fixed machinery and equipment, excluding the said items taxed as personalty, had a market value less than $1,363,740.

Upon the foregoing Findings of Fact I make the following:

Conclusions of Law.

1. The assessment of one-half the imported veneers and lumber on hand May 1st, 1955, at a valuation of $144,296.26 and the levy of a personal property tax thereon based on such valuation was not in violation of Article I, section 10, clause 2, of the United States Constitution.

2. Plaintiff has failed to establish a cause of action for a refund of taxes based upon real estate being assessed at more than full market value which could ordinarily be obtained therefor at private sale or personal property being assessed in excess of true cash value or based upon assessments made against plaintiff being so substantially out of line with other assessments as to impose an inequitable tax burden.

3. By reason of Finding of Fact No. 9, and notwithstanding Conclusion of Law No. 2, plaintiff is entitled to a refund of the personal property taxes in the amount of $2,291.39 assessed against the personal property of the valuation of $123,490 mentioned in Finding of Fact No. 9.

4. Plaintiff is entitled to Judgment against the defendant for the sum of $2,291.39, together with interest at 5% from January 4th, 1956, and together with costs in the amount of $100, plus clerk's fees, plus witness fees for two days attendance by Mr. Kambach.

Let Judgment be entered accordingly.

Dated this 24th day of October, 1956.

By the Court,
E. M. Duquaine,
Circuit Judge.

APPENDIX B.

Majority and Minority Opinions of Wisconsin Supreme Court.

(Caption, Case No. 120, August Term, 1957.)

Appeal from a judgment of the circuit court for Kewaunee County: E. M. Duquaine, Circuit Judge. Affirmed.

Action by a manufacturer against a city to recover taxes on personal property paid under protest. The property in controversy consisted in part of wood veneers and lumber imported from outside the United States, and the validity of the tax on such veneers and lumber was challenged on the ground that it was an "impost or duty on imports" and therefore prohibited by Art. I, Sec. 10, Clause 2 of the Constitution of the United States. The trial court sustained the validity of the tax and denied recovery thereof. Plaintiff appeals.

The trial court made comprehensive findings of fact, the adequacy and correctness of which are not challenged. For present purposes, the facts so found may be summarized as follows: Plaintiff carries on a manufacturing business in the city of Algoma. In the manufacture of its products it uses both foreign and domestic wood veneers, and both foreign and domestic lumber. It imports the foreign veneers from various nations, and they are received at its plant in Algoma in bundles secured by metal straps, or in wooden crates, such straps or crates being the original packages in which they are shipped. The veneers are kept in such packages and stored in plaintiff's warehouse until used in the manufacture of veneered products.

The foreign lumber is imported by plaintiff from Canada in rough unplaned form, in railroad cars, the individual pieces not being bundled or fastened together in any way.

Most of this lumber is "green", and must be dried before being converted into manufactured products. When received it is piled in plaintiff's storage yard in such a manner as to facilitate air-drying, and for the dominant purpose of air-drying it. Air-drying does not remove enough of the moisture, and the lumber must also be kiln-dried. While the drying might be done entirely in the kiln, it is more economical, and is good business, to air-dry it before it is run through the kiln.

On the assessment date, May 1, 1955, foreign veneers and foreign lumber thus stored in plaintiff's warehouse and storage yard had a value of $288,593. The assessor determined, and the trial court found, that one-half of the imported veneers and lumber, of the value of $144,296 were required to be on hand because reasonably necessary to meet plaintiff's current operational needs as a manufacturer. The court held, in an opinion carefully analyzing the authorities, that the constitutional provision invoked by the plaintiff did not immunize the imported materials thus required for current operational needs, from the city's general property tax.

WINGERT, *J.* The question for decision is whether clause 2, of sec. 10 of Art. I of the Constitution of the United States prohibits the imposition of the city's general property tax on the veneer and lumber imported by the plaintiff from other nations, which are still in the original package or form in which imported, but which are held and needed for the manufacturer's current operational needs.

The constitutional provision is as follows:

> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. * * *"

The purpose of the provision so far as it relates to imports appears to have been to prevent discrimination against imports by means of taxation, and to prevent the seaport states through whose harbors most imports then came, from taxing the imports of the other states, and thus burdening the commerce of the latter and continuing the commercial warfare between the states which it was one of the main objectives of the framers of the Constitution to suppress. See Madison, Debates in the Federal Convention of 1787, August 28, 1787 (Hunt & Scott ed.) 479; *Brown* v. *Maryland*, 12 Wheat. 419, 440.

1. *Established interpretations.* As an original proposition, it might well be doubted that a general property tax not discriminating against imported goods is "an impost or duty on imports". The Supreme Court of the United States has held that such a tax is within the purview of the constitutional provision, however, and of course we are bound thereby. *Low* v. *Austin*, 13 Wall. 29, 34.[1]

The leading case on the interpretation of the constitutional provision is *Brown* v. *Maryland*, 12 Wheat. 419, in which a state statute requiring importers of foreign goods by bale or package to take out a license and pay a fee of $50 before selling the goods, was held to impose an unconstitutional impost on imports. The extensive opinion by Chief Justice Marshall is one of that jurist's landmark opinions and characteristically went beyond the necessities of the particular case. While the Maryland statute was plainly discriminatory against imports and might have been disposed of on that ground, the Chief Justice went further and declared in substance that a tax on an imported article in the hands of the importer is a duty or impost on

1. A distinguished scholar in this field, the late Prof. Thomas Reed Powell, commenting on the opinions in *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, says "We could welcome fresh consideration whether property taxes should be regarded as 'imposts' or 'duties' ". 58 Harvard Law Review 858, 874.

the import. Referring to the above stated purpose of the constitutional provision, the Chief Justice said:

> "* * * it is plain, that the object would be as completely defeated by a power to tax the article in the hands of the importer *the instant it was landed*, as by a power to tax it while entering the port. * * * A duty on imports is a tax on the article which is paid by the consumer. The great importing States would thus levy a tax on the non-importing states * * *" (pp. 439-440).

Conceding that the immunity cannot follow the import indefinitely, and must end somewhere, the Chief Justice proceeded:

> "But, while we admit that sound principles of construction ought to restrain all Courts from carrying the words of the prohibition beyond the object the constitution is intended to secure; that there must be a point of time when the prohibition ceases, and the power of the State to tax commences; we cannot admit that this point of time is *the instant that the articles enter the country.* It is, we think, obvious, that this construction would defeat the prohibition." (p. 441.)

The Chief Justice recognized that it would be futile to try to stake out in advance the line where immunity ceases and the states' power to tax attaches.

> "The constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. * * * Yet the distinction exists, and *must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application.*" (p. 441.)

Nevertheless, and we must assume tenatively in view

of the language just quoted,[2] he suggested the following principle:

> "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution." (pp. 441-442.)

Chief Justice Marshall said much more in the course of his lengthy opinion, by way of argument, illustration and dictum, and on another branch of the case held that the Maryland statute was also invalid under the commerce clause of the constitution (Art. I, sec. 8). It is no disparagement of the great Chief Justice to point out that some of his dicta have not been followed by the court in later cases,[3] as for example, that to the effect that the principles laid down in *Brown* v. *Maryland, supra,* would apply equally to importation from a sister state (12 Wheat. at 449). It has later been held consistently that goods brought from another state are not imports within the meaning of Art, I, sec. 10 of the United States Constitution. *Woodruff* v. *Parkham*, 8 Wall. 123, 136, *American Steel & Wire Co.* v. *Speed*, 192 Wis. 500, 520. Likewise his original package doctrine has been repudiated as a

2. "But he (Marshall) had too much of an instinct for the practical to attempt rigidities which could not possibly bind the future * * * and so his views were often tentative and suggestive; they conveyed cross-currents of doctrine and purposed ambiguity." Frankfurter, The Commerce Clause, 44-45.

3. "* * * the rule announced in *Brown* v. *Maryland* has at times been severely criticized * * * and has in some cases been narrowly restricted in its application * * *." Black, J., dissenting in *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 688.

criterion of immunity of interstate shipments under the commerce clause, from state taxation. *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506.

While *Brown* v. *Maryland* dealt with a statute prohibiting sale of imported goods by the importer without payment of a license fee, it has been accepted as authority for the broader proposition that the imported goods themselves cannot be taxed while held in the importer's warehouse in the original package, for resale. *Low* v. *Austin*, 13 Wall. 29, 34, *May* v. *New Orleans*, 178 U. S. 496, 507. Immunity does not depend upon a showing that the tax is in fact discriminatory against imports. *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69, 76. After the merchandise has once been sold by the importer, however, it is taxable as other property, even though remaining in the original package. *Waring* v. *Mayor*, 8 Wall. 110, 122.[4] If the goods are taken out of the original outer package, even before sale, their immunity as "imports" ceases though they are still in smaller original packages. *May* v. *New Orleans*, 178 U. S. 496, 508-509.

Brown v. *Maryland*, *supra*, and most of the earlier cases dealt with attempts to tax directly or indirectly, goods held for resale. The leading case on state taxation of imports held by the importer for use in manufacture is *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, decided in 1945. In that case it was held that bales of hemp brought from the Phillipine Islands and stored in a manufacturer's warehouse in Ohio preliminary to use in the manufacture of cordage were imports in the hands of the importer within the meaning of Art. I, sec. 10, United States Constitution, and under *Brown* v. *Maryland*, *supra*, were immune from state ad valorem taxes (pp. 664-668). Four justices dissented from that feature of the decision now

4. A pledge of the goods by the importer has been held to terminate their immunity. *Southern Pac. Co.* v. *Calexico*, 288 Fed. 634, 641.

pertinent, in an opinion by Mr. Justice Black, 324 U. S. at 686.

In *Hooven & Allison Co.* v. *Evatt, supra,* the court recognized that the constitutional immunity from state taxation is lost when imported goods are put to the use for which they were imported, or when the original packages in which they were imported are broken (324 U. S. 652, at 665, 666). However, the majority was unwilling to terminate the constitutional immunity when the goods reached the factory warehouse in the original package.

> "But no opinion of this Court has ever said or intimated that imports held by the importer in the original package and before they were subjected to the manufacture for which they were imported, are liable to state taxation." (p. 666.)

On the contrary, the majority affirmed the dictum of Chief Justice Taney in *License Cases,* 5 How. 504, 575.

> "Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the state usually taxed for the support of state government." (324 U. S. at 666.)

Nevertheless the majority cautiously limited the decision to the case before it, holding that "It cannot be said that the fibers were subjected to manufacture when they were placed in petitioner's warehouse in their original package." (p. 667); and expressly saved the question which is before us today.

> "And it is unnecessary to decide whether, for purposes of the constitutional immunity, the presence of some fibers in the factory was so essential to current manufacturing requirements that they could be said to have entered the process of manufacture, and hence were already put to the use for which they were imported, before they were removed from the original

packages. Even though the inventory of raw material required to be kept on hand to meet the current operational needs of a manufacturing business could be thought to have then entered the manufacturing process, the decision of the Ohio Supreme Court did not rest on that ground, and the record affords no basis for saying that any part of petitioner's fibers, stored in its warehouse, were required to meet such immediate current needs. Hence we have no occasion to consider that question." *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 667.

Even this carefully limited decision commanded the support of only five of the justices. The other four dissented in an opinion by Mr. Justice Black, who considered that every conceivable relationship the bales of hemp had once borne to the process of importation had ended, and that therefore they were no longer immune as imports; and also pointed out that to accord them constitutional immunity from property taxes would effect a discrimination in favor of foreign as against domestic products. 324 U. S. at 686-691.

To sum up the state of the law to date, it appears that imported goods are immune from even non-discriminatory taxes on general property until sold by the importer, or removed from the original packages in which imported, or put to the use for which acquired, as where placed in process of manufacture. The Supreme Court has held, by the narrowest of margins, that the mere warehousing of the goods preliminary to manufacture does not of itself terminate the immunity. The application of the tax to raw materials stored at the importer's factory, which, though still in the original package, are essential to current manufacturing requirements has been expressly left undecided.

2. *The imported lumber.* The lumber in issue was imported from Canada in carloads of individual pieces not bundled or fastened together, and was unloaded and piled

in plaintiff's storage yard to facilitate air-drying. We have little difficulty in holding that it had ceased to be immune from the city's general property tax on the assessment date.

The lumber is not protected from taxation by the original package doctrine, for it was unpackaged, unless the freight car be considered a package, in which case it was removed from the original package when unloaded. The individual sticks of lumber themselves are certainly not packaged or packages in any reasonable sense of the term. *E. J. Stanton & Sons* v. *County of Los Angeles,* 78 Cal. App. (2d) 181, 188, 177 P. (2d) 804, 808. Cert. den. 332 U. S. 766.

Moreover, these pieces of lumber had "entered the process of manufacture", and thus had been "put to the use for which they were imported" (*Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, 657, 666) when they were stacked for air-drying, since the drying of the lumber was essential to manufacture, and therefore a first step in the manufacturing process. It was not necessary that the lumber be sawed up in order to place it in process of manufacture. The imported article consisted of a combination of wood and diffused water. Drying separates the wood from the water; sawing separates wood from wood. If the lumber had not been air-dried, it would have had to be kiln-dried for a longer time. Obviously it would be in process of manufacture when drying in an artificially-fired kiln. Removal of water is no less a manufacturing operation when performed out of doors by solar heat.

Insofar therefore as the judgment holds the lumber taxable, it must be affirmed.

3. *The imported veneers.* These present a much closer question. They were still in the original packages in which they were imported, consisting of metal straps around bundles of pieces in most cases, and of wooden crates in

thers. We assume for present purposes that straps holding bundles of pieces are a package. The veneers had not been subjected to any process to alter their form or chemical composition, but had merely been stored in plaintiff's warehouse to await processing.

If no other facts appeared, and on the assumption that straps around a bundle make a package, we would be constrained to hold the veneers immune from the city's tax on the authority of *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, discussed above, notwithstanding the dissent of the maximum minority from that decision and our own philosophical doubts about its correctness. But there are other facts in the present case which in our opinion are sufficient to distinguish it from that one.

In the instant case it was found as a fact by the trial court, and the finding is not challenged by appellant, that the veneers which were actually taxed were required to be on hand because reasonably necessary to meet plaintiff's current operational needs as a manufacturer. In making that finding, the trial court recognized the practical fact of industrial life, that if a manufacturer is to maintain the continuity of operation that is essential to efficiency and ability to meet competition and thus stay in business, he must at all times maintain on hand at his plant and ready for immediate use, a certain minimum stockpile of raw materials; and from that fact he stated the following conclusion:

> "If we accept the premise, as I think we should, that imported raw materials in original packages on hand May 1st, and required to be on hand at that time to meet the immediate or current needs of a manufacturer, have so definitely been taken out of the stream of commerce and have so finally come to rest in his plant, there, to a practical certainty, to lose their identity in a manufactured product, so that it may reasonably be said that it is at least highly improbable

> that such goods will ever again become the subject of sale and transport in their original packages, then, I think, such raw materials must be regarded for all practical purposes as having irrevocably become a part of the common mass of property within the taxing district and, by virtue of that fact, subject to the state's ad valorem personal property tax."

The trial court's finding brings the present case squarely within the category which was expressly left undecided in *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 667, quoted page 8 above, and which we may therefore decide on its merits.

We think the trial court was right in holding that the minimum stockpile of veneers which the manufacturer had to have on hand to meet current requirements was in substance being put to the use for which the raw materials were imported, even though not yet removed from their wrappings or subjected to any physical or chemical change. As to such goods, a rule which would make taxability depend upon the cutting of some metal bands or removal of a wrapping, would be too artificial and mechanical to commend itself. We think it would be equally mechanical, and disregardful of realities, to hold that the manufacturer must inaugurate some process of physical or chemical change before the goods can be considered as put to the use for which they were imported or can be regarded as a part of the mass of property which may be taxed for the support of state government. Foreign commerce, like commerce among the several states, "is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co.* v. *United States*, 196 U. S. 375, 398. As a practical matter, the minimum current operational requirements of materials which the manufacturer had assembled in his plant for purposes of immediate availability for change in form were in use in

and devoted to the manufacturing enterprise, as much as if they were being dried, heated, reshaped, chemically treated, or otherwise changed in form or composition. The purpose for which the veneers were imported was to meet the requirements of a going manufacturing concern; and one of such requirements was the presence of a stockpile equal to minimum current manufacturing requirements. As a practical matter, a manufacturing enterprise cannot be carried on successfully without having current operational requirements of raw materials on hand, especially where it takes a considerable time to get more of the materials after ordering them, any more than it can be carried on without changing their form or composition.[5] The decision under review merely recognizes and gives significance to that fact of industrial life.

We appreciate that there are expressions in the decisions of the U. S. Supreme Court which may be cited against the conclusion we have reached; but they must be read in connection with the facts of those cases. No case has been brought to our attention, nor have we found any, in which the facts on which the trial court based its decision in the present case were found to exist and were brought to the attention of the Supreme Court. In the one case where the argument was made, it was rejected and decision was specifically reserved on the point, because the record did not afford a basis for saying that any part of the imported material was required to meet immediate operational needs. *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 664, 667.

We think it accords with sound policy, and does no violence to either the purpose or the words of the constitu-

5. Respondent's brief puts the proposition picturesquely as follows: "If, when dawn broke over Algoma on the first day of May, 1955, appellant had everything on hand except the imported raw materials necessary to meet current manufacturing requirements, it is reasonable to assume that appellant would have been out of the manufacturing business, at least temporarily."

tional provision, to hold that the city may tax the imported veneers in question. We are satisfied that the rule we are adopting preserves the immunity of imports long enough to serve all purposes for which the provision was adopted. The tax is not discriminatory, for it applies alike to all comparable property in the city, regardless of origin. The city has furnished a *quid pro quo*, by extending its police and fire protection to the veneers and lumber as to other property. The tax cannot prejudice foreign commerce, nor afford a means by which seaport or border states can burden the others or wage commercial warfare against them by taxing their imports, fear of which activity was the motive for adopting the constitutional provision.[6]

On the other hand, to hold that the immunity of imported goods extends to the point claimed by appellant, would work an affirmative discrimination against domestic materials and against manufacturers using domestic materials, and would enable the importing manufacturers to obtain police, fire and other local protection and benefits without paying for them. While such discrimination also results from some application of the constitutional provision in question by which we are bound, it is nevertheless proper to consider it as a relevant factor in determining whether the immunity should be extended beyond the absolute compulsion of the decisions of the court of last resort.

It is argued that the original package rule is easy to

6. After a penetrating commentary on the majority and minority opinions in *Hooven & Allison Co.* v. *Evatt, supra*, the late Prof. Thomas Reed Powell said: "The immunity must survive to the extent that neither the goods nor dealings in them are, under any circumstances of time or place or condition, taxed or taxable because of their origin. To say that it must prevail against inclusion in general assessments after arrival or else be destroyed is to take an animistic view of the goods themselves as sacred objects and to forget the commercial aspects of foreign trade and domestic absorption." 56 Harvard Law Review, 858, 875.

administer, while it may be difficult to determine when imports have ceased to be imports as a result of becoming part of the stockpile required for current operational needs. We think, however, that the reasons both of constitutional law and policy against further extension of the immunity from state and local taxation outweigh mere problems of administration. Current operational requirements are a fact, not a fancy; and like value, they can be determined by the assessing authority, albeit sometimes with difficulty. The original package rule itself may present substantial administrative difficulties. See Mr. Justice Black's dissent in *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 691; and *E. J. Stanton & Sons* v. *County of Los Angeles*, 78 Cal. App. 2d 181, 186, 177 P. 2d 804, 807. In taxation, absolute certainty cannot be had or expected, as the numerous cases on valuation pointedly illustrate.

By the Court.—Judgment affirmed.

Brown, *J.* (Dissenting in part, concurring in part.) As an original construction of Art. I, Sec. 10, Cl. 2, U. S. Constitution, I would have little difficulty in agreeing with the dissenters in *Hooven & Allison Co.* v. *Evatt* (1945), 324 U. S. 652, 688, 142 Ohio St. 235, that when imported goods or raw materials have reached the place where the importer intends to put them to the use for which they were imported and he stores them until he needs them, a non-discriminatory *ad valorem* tax upon them does not offend the Constitution even though the goods or materials in such storage remain in their original package. The difficulty would be even less in agreeing with the majority of this court that part of the goods are taxable.

But I must recognize that this is not an original proposition and the dissenters' view in *Hooven & Allison* v. *Evatt, supra,* is that of a minority. The majority in that case reiterated the law as it has been established by an

unbroken line of decisions beginning with *Brown* v. *Maryland* (1827), 12 Wheat. 419, that the constitution protects imported items against local taxation while they are in their original packages and have not been disposed of or used by the importer. For examples see *Low* v. *Austin* (1871), 80 U. S. 29; *Anglo-Chilean Corp.* v. *Alabama* (1933), 288 U. S. 218, 225 Ala. 141, as well as *Hooven & Allison Co.* v. *Evatt, supra.*

In the latter case, the majority said, p. 666:

> "* * * no opinion of this Court has ever said or intimated that imports held by the importer in the original package and before they were subjected to the manufacture for which they were imported, are liable to state taxation. * * *"

And, further, p. 667:

> "It cannot be said that the fibers were subjected to manufacture when they were placed in petitioner's warehouse in their original packages. * * *"

The law, as I read it, is well settled by the decisions of the supreme court of the United States that until put to use or sold or otherwise disposed of by the importer materials in their original packages are not subject to a state tax. The veneers now in question satisfy all these conditions of immunity; and, like the fibers in *Hooven & Allison*, have not been subjected to manufacture. It is our proper province to apply that oft-stated law. It is not our province to modify it or to declare exceptions to it.

The argument, unsupported by the record, was made by the tax collector in *Hooven & Allison Co.* v. *Evatt, supra*, that some of the materials were so essential to current manufacturing requirements that they might be deemed to have entered the manufacturing process and so were taxable, as already put to use although still in their original packages. In reply to this the court said (p. 667):

there was no necessity and no occasion to consider that question. I cannot agree with the majority of our court that the form of the rejection of the argument changed the established law. The decision, in fact, *refused* to change it. Therefore I consider that this court is still bound to apply the law as it has been so often declared and as it remained when the court got through with *Hooven & Allison Co.* v. *Evatt, supra.* We, as a state court, have not been invited nor are we authorized to create an exception to the principle so often stated by the United States supreme court, that in the original package, unsold and unused imported materials are tax exempt. It is not for us to say that their immunity is lost when the day of use draws near. The United States supreme court was asked to make that change in the law. It would not. We should not.

Therefore, I think we must reverse, as to the veneers.

Respecting the lumber, the learned trial court found that the method of piling it had the dominant purpose of readying it for use. That finding makes it possible, I think, to agree that the manufacturing process had begun when the pile was constructed. Therefore I am able to concur in the decision that the lumber lost its status as an import and is taxable, though the ground that half of it is taxable because of current manufacturing needs is untenable.

I am authorized to say that Mr. Justice Currie and Mr. Justice Steinle concur in what is said here.

APPENDIX C.

Judgments of State Courts.

State of Wisconsin. Circuit Court. Kewaunee County.

UNITED STATES PLYWOOD CORPORATION, a Foreign Corporation,
Plaintiff,
vs.
CITY OF ALGOMA, a Wisconsin Municipal Corporation,
Defendant.
} Judgment.

The Court having by order herein, dated January 10th, 1957, directed that Judgment be entered herein in favor of the plaintiff and against the defendant, which order is on file herein;

NOW, THEREFORE, In Pursuance of such order and On Motion of Larkin & Blum and S. Knudson, attorneys for said defendant,

IT IS ADJUDGED That the plaintiff have and recover of and from the defendant the sum of $2,536.00.

Dated this 11th day of January, 1957.

By the Court.

/s/ ORVILLE J. ALBRECHT,
Clerk.

(Seal)

Judgment of Wisconsin Supreme Court.

And afterwards, to-wit: on the 7th day of January, A. D. 1958, the following proceedings were had in said cause in this Court:

UNITED STATES PLYWOOD CORPORATION, a foreign corporation,
Appellant,

vs.

CITY OF ALGOMA, a Wisconsin municipal corporation,
Respondent.

This cause came on to be heard on appeal from the judgment of the Circuit Court of Kewaunee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Kewaunee County, in this cause, be, and the same is hereby, affirmed with costs against the said appellant taxed at the sum of Ninety-nine Dollars and No Cents ($99.00).

Justices Brown, Currie and Steinle dissent.